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In the Supreme Court of the United States

OCTOBER TERM, 1997

CITY OF CHICAGO,

Petitioner,

v.

JESUS MORALES, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF AMICUS CURIAE OF SEE FOREVER/THE MAYA ANGELOU PUBLIC CHARTER SCHOOL IN SUPPORT OF RESPONDENTS

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BRIEF AMICUS CURIAE OF SEE FOREVER/THE MAYA ANGELOU PUBLIC CHARTER SCHOOL IN SUPPORT OF RESPONDENTS

The City of Chicago's Gang Congregation Ordinance at issue in this case (Chicago Municipal Code § 8-4-015) authorizes a police officer under certain circumstances to order persons who are *not* gang members and are *not* believed to be gang members "to disperse and remove themselves from the area." *Id.* at § 8-4-15(a) (Pet. App. 61a).[1] This brief is submitted primarily to describe the effect of the Ordinance on the rights of innocent and well meaning persons, not engaged in any form of wrongful

[1] Written consent to the filing of this brief has been obtained from the parties. Copies of the consent letters accompany this brief. Pursuant to this Court's Rule 37.6, amicus states that this brief was not authored in whole or part by counsel for any party and that no person or entity, other than the amicus and its counsel, made any monetary contribution to the preparation or submission of this brief.

conduct, to use the streets and converse and associate with other persons who are behaving lawfully.

INTEREST OF THE AMICUS CURIAE

See Forever/The Maya Angelou Public Charter School ("See Forever") is a tax-exempt educational organization that provides a widely praised teaching and life-training program for "at risk" teenagers in the District of Columbia.[2] See Forever students attend a school with small classes, high academic standards, and innovative approaches to education. See Forever students also develop work skills by working at a student-run catering business and a student technology shop, and through internships at private businesses such as Fannie Mae, Borders Books & Music, Kinko's Copies, and the law firm of Steptoe & Johnson. See Forever also gives its students wrap-around support, including counseling, tutoring, and access to mental and physical health care. Finally, in addition to traditional school and work, See Forever promotes a variety of activities that encourage responsible behavior, good work habits, teamwork, trust, and nonviolent means of resolving differences. Students are generally engaged in See Forever activities 10 1/2 hours per day, from 9:30 AM to 8:00 PM.

See Forever's mission is to graduate educated and hard-working young adults who are guided by strong moral principles and committed to their families and their communities. As part of this commitment to community, See Forever students are encouraged to spend time on the streets as "student ambassadors" to their acquaintances. As ambassadors, they actively promote education, hard work, and self-discipline as alternatives to the gang life. They show their friends, some of whom may still be in gangs, that there is a better way. By doing so, they reinforce their

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[2] *See, e.g.*, Peter Slevin, *A New Way to See the Future*, WASH. POST, Mar. 23, 1998, at B1.

own commitment to their new lives, and they also provide the peer and community encouragement that, in See Forever's view, is the best hope of saving other youngsters from gangs.

A law like the Chicago Ordinance clashes, brutally, with everything See Forever is trying to accomplish. Most See Forever students live in neighborhoods similar to those that the Chicago Police Department has "designated" (*see* Pet. App. 68a) for enforcement of the Ordinance in that city. The Ordinance says to a teenager who lives in a "designated" neighborhood that however law-abiding he may be, his rights to move about and gather and converse have no value: the police control the neighborhood, and he can be ordered to disperse at a police officer's whim. And the Ordinance tells a teenager that however good his intentions, if he is speaking to a gang member he is doing something bad, no matter what he is saying. Where See Forever seeks to promote a sense of worth and community participation, the Ordinance gives up on the community and its residents and seeks to maintain order by sweeping the streets. And where See Forever believes that teenage "ambassadors" are among the best ways to convert gang members to a better life, the Ordinance replaces such efforts with "dispersement orders" and makes it more dangerous for well intentioned people to be on the street, where they face not only gang members but also the threat of fines and imprisonment.

SUMMARY OF ARGUMENT

This brief asks the Court to look at the Chicago Ordinance through the eyes of a teenager who is trying to build a good life but has the misfortune to live in a neighborhood "designated" by the police for enforcement of the Ordinance. It is almost impossible to overstate the impact of such a law on an inner-city teenager's everyday life, his efforts to engage in constructive activities with

peers, and his attitude toward society, the police, and the law. When See Forever students are not in school or engaged in other See Forever activities, they may well be lawfully standing on the corner, making conversation, or taking to friends: for students who often come from dysfunctional and virtually uninhabitable homes, there is no good alternative to the street corner. When a police officer "removes" such students, the officer denies them *any* place to stand and be themselves and engage in the routine activities of teenage life. Moreover, authorizing such removals makes it impossible for teenagers like See Forever students to act as "ambassadors" to eliminate gangs and gang violence at their roots: since teenagers socialize on street corners, See Forever students cannot reach their friends who are still gang members unless they can be on street corners, with friends, spreading the See Forever gospel. Finally, a law like the Ordinance sends the wrong message to young people who are struggling to leave the life of the gang and enter the life of established economic and legal structures. By giving individual police officers the discretion to clear the streets without identifying any criminal conduct, the Ordinance reinforces the existing sense that if you live in a "designated" neighborhood the law will assume you are up to no good.

This Court has held repeatedly that "[a]n individual, whom police . . . do not have probable cause to believe has committed a crime, is entitled to continue to walk the public streets" and cannot be barred from doing so "'at the whim of any police officer.'" *Kolender v. Lawson*, 461 U.S. 352, 358 (1983), (quoting *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965)); *see Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). The Ordinance squarely violates that right, particularly with respect to law-abiding persons whose only pertinent characteristics are that (i) they are "with" a suspected gang member and (ii) their purpose is not "apparent" to a police officer. Our argument is in two parts.

First, the Ordinance, as construed by the Illinois Supreme Court, gives the police arbitrary and unchecked power to compel virtually any person in a "designated" neighborhood to "leave the area." This denies the commonplace but fundamental right to move about and speak with others so long as one is not doing or discussing or contemplating any wrong. A person in such a neighborhood who is confronted with such an order, backed by the threat of fine and imprisonment, has no alternative but to obey. No matter how unobjectionable, or even well meaning, such a person's conduct and intentions, he has no way of knowing whether his purposes are "apparent" to the officer, whether the officer has reason to believe someone else is a gang member, or whether he would be able to prove that all persons present are *not* gang members. A parent in such a neighborhood would surely advise her children to obey any dispersement order without question--and would be well advised to do so herself.

Second, this intrusion on the individual freedoms of law-abiding citizens is not justified by any law-enforcement purpose. Chicago already has (and any city could constitutionally adopt) laws that permit the police to deal with actual wrongdoing, including loitering with intent to obstruct or intimidate other persons. Such laws can also reach bystanders whose presence knowingly or recklessly interferes with police officers doing their jobs. As Illinois courts at all levels concluded, there was no need to authorize the police and prosecutors to bypass all proof of either wrongful action or wrongful intent and simply sweep the streets.

ARGUMENT

THE CHICAGO ORDINANCE UNCONSTITUTIONALLY RESTRICTS THE RIGHTS OF ORDINARY CITIZENS, WHO ARE NOT ENGAGED IN OR PLANNING OR ABETTING ANY UNLAWFUL ACTIVITY, TO USE THE STREETS, ASSEMBLE, AND SPEAK WITH OTHER PERSONS

This case is about a serious intrusion on the rights of law-abiding people who live in a "designated" neighborhood to engage freely in the ordinary activities of life. Petitioner's argument (Br. 39-44)[3] that the Chicago Ordinance does not affect fundamental rights is startlingly wrong: No American with the resources to live outside of a "designated" area would tolerate a regime in which he or she could be ordered to "disperse" from a neighborhood street, on threat of fine and imprisonment, solely because (i) his or her purpose is not "apparent" to a police officer and (ii) the officer claims reason to believe that someone *else* in the area is a gang member. The First Amendment and the Due Process Clause of the Fourteenth Amendment protect more than the right to make political speeches: they protect the right to stand and move about on the streets of one's own neighborhood for the ordinary purposes of life. The Constitution protects the right to gather with acquaintances or strangers, the right to engage in ordinary conversation in public places, and the right to attempt to persuade others to one's point of view. Such rights are fundamental to any free society, as this Court has stated repeatedly.[4]

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[3] *See also, e.g.*, Brief Amicus Curiae of United States 22-29; Brief Amici Curiae of Chicago Neighborhood Orgs. 25-29; Brief Amici Curiae of U.S. Conference of Mayors, *et al.* 10-18; Brief Amicus Curiae of Washington Legal Foundation, *et al.* 9-19.

[4] *See Kolender*, 461 U.S. at 358 (loitering ordinance jeopardizes (continued...)

The Ordinance violates these basic liberties. As we show in Part A below, it gives the police arbitrary power to sweep the streets of persons whose actions and intentions are lawful and proper. And as we show in Part B, the Ordinance is not necessary to deal with improper actions, such as loitering for improper purposes and interfering with other residents or the police, because all such actions can be prohibited by properly drafted laws, including ordinances already on Chicago's books. Difficulties of proof do not justify "dispersement" of persons who have not done or intended any wrong.

A. The Chicago Ordinance Interferes with Fundamental Rights by Giving the Police Arbitrary Power To "Sweep . . . the City's Streets"

"Our Constitution is designed to maximize individual freedoms within a framework of ordered liberty." *Kolender*, 461 U.S. at 357. Under the Chicago Ordinance, "individual freedoms" and "liberty"--including the freedoms of persons as to whom there is not even a suspicion of wrongdoing--are wholly subordinated to "order."

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[4] (...continued)
"constitutional right to freedom of movement" and creates "'potential for arbitrarily suppressing First Amendment liberties'") (quoting *Shuttlesworth*, 382 U.S. at 91); *Papachristou*, 405 U.S. at 163, 164 (city cannot "make[] criminal activities which by modern standards are normally innocent"; wandering and strolling are protected "part of the amenities of life as we have known them"); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 96 (1965) ("Failure to obey [dispersement] order, when one is not acting unlawfully, certainly cannot be made a crime in a country where freedom of locomotion . . . is honored.") (citation omitted); *Williams v. Fears*, 179 U.S. 270, 274 (1900) ("[u]ndoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty").

The Supreme Court of Illinois--whose construction of the Ordinance is of course binding, *e.g.*, *Kolender*, 461 U.S. at 355--held that the Ordinance is not subject to any limiting construction because its clear and unambiguous intent is to give the police arbitrary power to sweep the streets:

> [T]he gang loitering ordinance is not reasonably susceptible to a limiting construction which would affirm its validity. Although the proscriptions of the ordinance are vague, the city council's intent in its enactment is clear and unambiguous. The city has declared gang members a public menace and determined that gang members are too adept at avoiding arrest for all the other crimes they commit. Accordingly, the city council crafted an exceptionally broad ordinance which could be used to sweep these intolerable and objectionable gang members from the city streets.

(Pet. App. 16a.)

The sweep is not limited to suspected gang members. A police officer may order any other person who is "with" (term undefined) a suspected gang member to "disperse and remove [himself] from the area," on pain of fine and imprisonment, without any grounds for believing that *any* person present (including the gang member) has committed, is engaged in, or intends any wrongful act. (Pet. App. 61a, 63a.)

This Court held in *Kolender* that such standardless sweeps, under threat of criminal penalties, are impermissible:

> [T]he more important aspect of the vagueness doctrine "is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement." Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep . . . ."

> . . . [The statute at issue is facially invalid because] [a]n individual, whom police may think is suspicious but do not have probable cause to believe has committed a crime, is entitled to continue to walk the public streets "only at the whim of any police officer . . . ."

461 U.S. at 358 (citations omitted).

The focus of *Kolender* was not solely on the arbitrariness of the resulting *prosecution*, and (contrary to petitioner's argument, Br. 29, 34-35) the problem *Kolender* identified is not solved merely because the police officer's order to "disperse" is itself presumably unambiguous. *Kolender*, like this case, was concerned with the fundamental right to be on the street unless there are grounds for a contrary order. Indeed, this case is, in an important sense, *a fortiori* to *Kolender*: In that case, the statute required, and the Court assumed the officers had identified, "circumstances that would justify a stop under the standards of *Terry v. Ohio*, 392 U.S. 1 (1968)." 461 U.S. at 353. The Chicago Ordinance does not require any circumstance that would justify even a *Terry*-stop even of the suspected gang member, let alone of other persons present.

We ask the Court to consider the effect of the Ordinance on a law-abiding teenager who lives in a "designated" neighborhood. For a See Forever student, such a law would mean forfeiting one of the most basic rights of life in a democratic society: the right to stand in a public place and speak with friends. Many See Forever students and similar inner-city teenagers have nowhere to socialize except on the streets. Many come from dysfunctional and virtually uninhabitable homes. Many have parents who have abused drugs and alcohol, and many have been abused by their parents. Many live in small apartments, teeming with children, where air conditioning is rare and roaches and rats are common. Many do not have telephones to call their friends. And unlike many suburban teenagers, See

Forever students cannot escape with their friends to the den, the family's back yard, or the mall. For these students, the street corner is the only place to relax and socialize. Yet it is no exaggeration to say that under the Ordinance a teenager in a "designated" neighborhood faces the prospect of a command to "disperse" every time he or she ventures out into the neighborhood for anything other than a solo errand that remains strictly solo--and that the teenager *must* obey every such order promptly or face a fine or imprisonment. If the Ordinance is constitutional, any group gathering in such a neighborhood can be dispersed at a police officer's whim.

1. To begin with, on its face, the Ordinance does not require that *any* person in the street gathering be engaged in, or discussing, or even contemplating any unlawful or improper activity. On the contrary, the Ordinance itself recites an extraordinary premise: the police must be given dispersement power because gang members "avoid arrest by committing no offense punishable under existing laws when they know the police are present." (Pet. App. 60a.)

Although the Ordinance states (*id.*) that it is aimed at activity that intimidates other persons and thus maintains gang control of a neighborhood, the Ordinance does not require proof, or even grounds for suspicion, that *any* person in the gathering is intimidating another person, or has an intent to intimidate or otherwise interfere with the passage or activities of any other person. Similarly, while the Ordinance asserts that gang members "create[] a justifiable fear for the safety of persons and property" (*id.*), it does not require any proof or grounds for suspicion that any person present is engaging in activities warranting alarm.[5]

[5] *Cf. State v. Ecker*, 311 So. 2d 104 (Fla. 1975) (upholding statute barring loitering in an unusual manner under circumstances that warrant alarm).

A law-abiding and well intentioned teenager, confronted with an order to disperse, cannot respond, "I'm not doing, talking about, or even thinking about, doing anything wrong, and as far as I know no one else is either," because under the Ordinance all of that is irrelevant to an order to disperse, and a violation of the order can lead to fine or imprisonment.

2. Petitioner (Br. 30-31) and its amici (*e.g.*, U.S. Br. 12-15) argue that the word "loiter" somehow limits the power of a police officer to issue a dispersement order, but as the Illinois courts explained, the term imposes no useful limitation. "Loiter" is defined in the Chicago Ordinance to mean "to remain in any one place with no apparent purpose." (Pet. App. 61a.) Although the Ordinance does not say so explicitly, it appears that the person to whom such a purpose must be "apparent" is the officer who issues the dispersement order. But many if not most people who are on any street at any given time are there for a purpose that is not "apparent" to any police officer. Teenagers linger in upscale suburban shopping malls as well as the mean streets of Chicago's "designated" neighborhoods, and in neither case is their purpose generally apparent to any adult. Strollers, gossipers, people on their way somewhere who have stopped to rest, people escaping the heat, people who are planning a political parade, and innumerable others who are engaged in lawful and constitutionally protected activities generally will not--and certainly are not required to--make their purposes "apparent" to strangers including police officers.[6]

[6] The Supreme Court of Illinois explained: "a person waiting to hail a taxi, resting on a corner during a jog, or stepping into a doorway to evade a rain shower has a perfectly legitimate purpose in all these scenarios; however, that purpose will rarely be apparent to an observer." (Pet. App. at 10a.) The Appellate Court of Illinois offered as further examples of everyday activities with no "apparent" purpose, "someone waiting with a friend or a family member for a ride to the

(continued...)

Moreover, the fact that a person *does* have a proper purpose is not a defense to a dispersement order or prosecution under the Ordinance. In fact, a person's actual purpose does not matter at all. Under the Ordinance, if a police officer orders a teenager to disperse and the teenager fails to do so, he or she is punishable by fine and imprisonment for disobeying the order. Whether the teenager was discussing a social event, running an errand for a parent, heading for a political rally, chatting with friends or relatives, or trying (as See Forever students do) to persuade acquaintances to turn to a better life is irrelevant. All that matters is whether the person's purpose was "apparent" to the officer.

Conversely, if citizens possess an "apparent" noncriminal purpose, the Ordinance gives the police no power to order dispersement, regardless of their actual purpose. The district court offered the example of teenagers playing basketball while waiting for a drug delivery. (Pet. App. 48a-49a.) Petitioner adds a remarkable example: "Under the ordinance, gang members remain free to protest, picket, solicit contributions for their gangs [!], conduct a leafleting campaign, or engage in any other of the innumerable types of expressive conduct that has an 'apparent purpose.'" (Br. 27.) In other words, it appears that actual gang members could immunize themselves against a dispersement order by carrying signs saying "Re-elect Mayor Daley" or "Support the Vice Lords."

In sum, a teenager who is on the street for virtually any actual purpose can, as long as the purpose is not inescapably apparent, be characterized as loitering, and the Ordinance provides no defense to protect those with

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[6] (...continued)
grocery store, or someone waiting outside the laundromat for their cloth[e]s to dry [or] . . . two friends who see each other on the street and stop to talk." (Pet. App. 27a.)

legitimate and constitutionally protected purposes from being forced to disperse, fined, or imprisoned.

3. The only other requirement of the Ordinance, the presence of at least one person whom the police officer "reasonably believes" to be a gang member, also affords an innocent and well meaning teenager no defense whatsoever to a dispersement order backed by the threat of a criminal charge.

First, the teenager need not herself be a gang member, or be suspected of gang membership, to be subject to an order to disperse. Moreover, the teenager need not know or suspect that a gang member is present, and the police officer need not give reasons. If a police officer says, in a "designated" neighborhood, "I believe a gang member is present so you all must disperse," a law-abiding teenager resists that order strictly at his or her own peril.

Second, the Ordinance does not state that a person accused of disobeying a dispersement order can defend on the ground that the police officer's belief that a gang member was present was not reasonable. (On the contrary, the only defense set forth in the Ordinance is an "affirmative" showing that no person present was in fact a gang member.) But even if reasonableness in fact were a requirement of the offense, a teenager confronted with a dispersement order has no way of knowing whether the police officer has reasonable grounds and, again, can resist the order only at his or her peril.[7]

Third, the "affirmative defense" (Chicago Municipal Code § 8-4-015(b)) that "no person who was observed

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[7] Amicus assumes that police officers will ordinarily act in good faith. But the Ordinance requires no advance or third-party review of the police officer's grounds for believing a person to be a gang member. On the contrary, if reasonableness were ever an issue in a subsequent prosecution, the police officer could defend his or her actions with the benefit of hindsight.

loitering was in fact a member of a criminal street gang" has no practical significance to a teenager who is trying to determine how to behave on the streets. (Pet. App. 61a.) An innocent and well meaning teenager confronted with a dispersement order may believe that no gang members are present but will often have no way to be certain, particularly in a group of any size in a "designated" neighborhood. And he or she will almost certainly be unable to bear the apparently "affirmative" burden of proving that no gang members were present.[8] Among other things, "gang" is defined to include an "informal" association and "member" is not defined at all. In light of this considerable ambiguity, a teenager confronted with a dispersement order will have no confidence that he will have the resources to find each person who was present and prove non-gang membership.

Finally, there is no deterrent to an officer's overly aggressive, careless, or simply incorrect belief that some person in a street gathering is a gang member. On the contrary, the officer's principal purpose, in virtually every case, will be to break up the gathering. Armed with the threat of fine or imprisonment, the officer will always succeed, because no law-abiding person will be confident of any defense against a charge of refusal to obey. If it later appears that no gang member was present in fact, the individual prosecution will fail, but the underlying purpose--sweeping streets--will have been achieved at no cost to the police force. The cost will be borne by

[8] The Ordinance implies that the defendant would have the burden of proving this negative. Neither petitioner nor the Illinois courts have suggested otherwise. Accordingly, amicus will not discuss whether this assignment of the burden of proof constitutes an additional ground for declaring the Ordinance unconstitutional (*cf. Patterson v. New York*, 432 U.S. 197, 210 (1977) (discussing constitutional limits on when government may "reallocate burdens of proof by labeling as affirmative defenses" elements of a crime)) or whether the Ordinance can be construed to avoid this difficulty.

law-abiding persons who have been disrupted in the conduct of their ordinary lives--and who will be disrupted again and again. Indeed, inappropriate enforcement of the Ordinance may seldom even come to light, because law-abiding citizens will disperse, sparing the police the burden of explaining their actions in court.[9]

4. Even in cases where at least one gang member is known to be present, the Ordinance conflicts with fundamental rights of others whose presence is law-abiding or even well meaning. It is not unlawful to stand near a felon when the felon's not engaged in his employment. And one may talk to a felon if the talk is benign. Indeed, the Ordinance does not purport to make such conduct unlawful. Instead, the Ordinance empowers the police to order this lawful conduct to stop, and to prosecute those who defy the order. If the felon--the gang member--"moves on" and the law-abiding teenager remains, only the latter can be prosecuted.

The Circuit Court of Cook County posed a hypothetical example it found very troubling. It is an example at the heart of the particular concern of amicus. The court asked petitioner during oral argument:

> [W]hat would occur . . . if an officer observed a "known" gang member . . . talking with three members of the Northwest Community Federation. The hypothetical assumed that the three . . . were trying to talk the gang member into leaving the gang. The City responded that the officer would approach the four

[9] *See generally* John C. Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 216 (1985) ("where there is an identifiable victim (who is likely to keep track of police action), or where the crime is very serious (and thus likely to attract public monitoring of prosecutorial decisions), the risk of abusive enforcement is reduced").

> individuals and order them to leave. If his order was disobeyed, all four would be arrested.

(Pet. App. 57a.) In this hypothetical, no one is engaging in any criminal act, and (the court stipulated) "[n]o criminal intent existed, no danger to the community was imminent, and nobody's path was blocked." *Id.* Moreover, although the three Federation members did not have any purpose "apparent" to the hypothetical police officer, their actual purpose was, as the court pointed out, not only "lawful" but "positive." *Id.* Yet they were subject to arrest and, ironically, would have been subject to arrest and prosecution even if the gang member had obeyed and dispersed.

The City's response to the court's hypothetical makes it clear that the Ordinance would chill exactly the kind of constitutionally protected activity--speaking to others and encouraging them to leave street gangs--that See Forever students regularly engage in. See Forever students are encouraged to speak to friends about the new lives they have begun for two reasons. First, See Forever believes--and it is not a new or controversial idea--that one of the best ways to help its students toward proud and productive lives is to teach them to help others. See Forever students are taught that individual responsibility is the foundation of a good life and that they must take responsibility for what they have done and should encourage others that no matter what mistakes they have made, they too can turn their lives around. Second, See Forever believes that its students can best contribute to the fight against street gangs and criminality by counseling and cajoling others toward a better life. The street corners are the only place where See Forever students can reach these teenagers, because the most "at risk" teenagers do not go to church, school, or community meetings.

Nor is it sufficient to say that student ambassadors could set up information booths or pass out flyers. See Forever

students are effective because they can communicate naturally to their gang-involved acquaintances their excitement over their new lives. A See Forever student plants the seeds by telling his acquaintance what he did that day: "I got an 'A' on my paper about Duke Ellington." "I helped program a computer at Fannie Mae." "I filled out a college application." Or the student tells how his school feels: "The classes are small. The teachers really care. It's like a family." The conversion process begins when the acquaintance sees the excitement in the See Forever student's eyes and compares it to his own dead-end life and begins to think that he is just as good as the See Forever student and he can do it too. This kind of important--and constitutionally protected--speech would be eliminated by an Ordinance that sweeps the streets.

The Ordinance runs counter to the message that See Forever believes is essential to defeating the gangs and their influence. See Forever teaches its own students and other "at risk" teenagers that society rewards responsibility, work, and compliance with law. See Forever's message is that society respects good citizens even if they come from bad neighborhoods. That message can be hard to sell in communities that often feel victimized by overzealous law enforcement and believe that the legal system discriminates against poor people and minorities. Nonetheless, See Forever is succeeding in some of the District of Columbia's toughest neighborhoods and with some of its most "at risk" teenagers. The Ordinance, by contrast, criminalizes ordinary and law-abiding behavior; it subjects the well meaning citizen to the same sweep of the streets as the gang member. It reinforces the belief that if you come from a bad ("designated") neighborhood you are specially subject to arbitrary police orders. And it tells "at risk" teenagers that no matter how hard they work to become part of mainstream society, than are no different in the eyes of the law than before they changed their lives.

In sum, the Ordinance gives the police the power to issue dispersement orders that law-abiding persons, engaging in wholly benign activities, can resist only at the distinct peril of a successful prosecution. It thus interferes with ordinary daily activities and constitutionally protected activities in a way that almost everyone not forced to live in a "designated" area would find intolerable. Petitioner acknowledges (Br. 38) that this is "strong medicine" but says the disease requires it. But the medicine, even apart from its side effects, is far stronger than is appropriate to the disease. As the Illinois Supreme Court concluded and we show below, the objective can be achieved with laws far less restrictive of the rights of law-abiding and well meaning people.

B. The City of Chicago Has Adequate Means of Dealing with Gangs without Abridging the Rights of Law-Abiding and Well Meaning Persons

The Ordinance authorizes a police officer to sweep all people from an area whenever the officer sees any individual he reasonably believes to be a member of a gang. The purported justification for this power is the need to prevent "intimidati[on]" through which "criminal street gangs establish control over identifiable areas" and to preempt crimes that the police are unable to observe or to prosecute. (*See* Pet. App. 60a (Ordinance); Pet. Br. 3-4.) But the law's purposes can be achieved by enforcing statutes and ordinances that deter and punish actual, concretely threatened, and intended misconduct. There is no need for preemptive sweeps, and "this is not a case where further precision in the statutory language is either impossible or impractical." *Kolender*, 461 U.S. at 361.

The City of Chicago *may* outlaw loitering with any illicit purpose, including intimidation.[10] Indeed, the City

[10] *See* Pet. App. 10a-11a (citing *State ex rel. Williams v. City Court*, (continued...)

may criminalize the very activity described in the recitals to the Ordinance--*i.e.* "establish[ing] control over identifiable areas [] by loitering in those areas and intimidating others from entering those areas." (Pet. App. 60a.) The City obviously may also prohibit loitering for the purpose of acting as a lookout for gang members or other persons engaged in or planning a crime.

In fact, as the Illinois Supreme Court pointed out, the state and city already have powerful laws against "intimidation" and related evils.[11] Chicago's Deputy Police Superintendent estimated to the City Council that existing laws cover ninety percent of the situations about which other witnesses had complained.[12] Incidentally, it is not at

[10] (...continued)
520 P.2d 1166, 1168 (Ariz. Ct. App. 1974) (loitering for purpose of begging); *People v. Superior Court*, 758 P.2d 1046 (Cal. 1988) (loitering to solicit lewd or unlawful act); *State v. Ecker*, 311 So. 2d 104 (Fla. 1975) (loitering in an unusual manner under circumstances that warrant alarm); and *State v. Armstrong*, 162 N.W.2d 357 (Minn. 1968) (loitering with intent to solicit prostitution)).

[11] *See* Pet. App. 19a ("The city is not helpless in its war against the criminal activity of gangs. Many of the offensive activities the city claims the gang loitering ordinance will deter are already criminal acts. *See, e.g.*, 720 ILCS 5/12-6 (West 1996) (intimidation); 720 ILCS 5/12-6.1 (West 1996) (compelling organization membership of persons); 720 ILCS 5/12-6.2 (West 1996) (aggravated intimidation-a gang member committing the offense of intimidation for the purpose of furthering gang activities); 720 ILCS 5/25-1 (West 1996) (mob action).").

[12] Supp. R. II. at 181-82 (testimony of Deputy Superintendent Gerald Cooper) (answering question "[a]re there already laws and it's just a question of enforcement?," by stating: "I think there are already laws. I think there are already enough laws on the books at thispoint, criminal laws, criminal penalties which are much different than the ones that are articulated in the ordinance. But certainly, there [are] always going to be situations where there is no specific violation . . . but for the most part and in the examples that people have been giving . . . I would think (continued...)

all clear that the Ordinance has improved law enforcement; some reported statistical data show that gang-related killing in Chicago climbed while the loitering ordinance was in force.[13]

Moreover, the city *may* authorize the police to order even innocent and well meaning persons to leave the scene of actual misconduct. It may prosecute persons who refuse to obey such an order.[14] For example, if a police officer sees that at a particular place some individuals (whether gang members or not) are intimidating others, or loitering

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[12] (...continued)
that 90 percent of those instances are actually criminal offenses where people, in fact, can be arrested.").

Boston has reportedly succeeded in reducing gang violence, without loitering or curfew laws, through a combination of community programs like See Forever and aggressive police work against actual crimes. *See, e.g.*, Steven A. Drizin, *Anti-Loitering Laws Don't Prevent Shootings*, CHI. DAILY L. BULL., July 8, 1998, at 6 (describing how "Boston's reduction in gang violence was achieved without relying on curfews, anti-loitering ordinances and other such laws," but rather on aggressive traditional enforcement tactics coupled with prevention programs).

[13] *See Morning Edition* (NPR radio broadcast, Apr. 22, 1998) (*available in* 1998 WL 3307123) ("[C]ity officials like to boast that gang-related killings dropped while the law was in force. The city's homicide figures show otherwise. Gang deaths increased every year the law was in effect, except one. And that drop came a year after the number of gang-related homicides had doubled.").

[14] *See Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) ("When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious."); *see, e.g., City of Portland v. Hemstreet*, 850 P.2d 1131, 1133 (Or. Ct. App. 1993) (upholding statute allowing police to disperse entire crowd if two or more people present "'[a]re threatening bodily harm to another or damage to property, with immediate power to carry out that threat'") (quoting Portland City Code § 14.24.100).

with intent to intimidate, the officer may both arrest the persons so engaged and also order others away from the scene if their mere presence assists the perpetrators and interferes with legitimate police procedures.

Colten v. Kentucky, 407 U.S. 104 (1972), illustrates the proper way to authorize dispersement of persons whose mere presence interferes with the police or aids wrongdoers. *Colten* involved a statute that prohibited, as "disorderly conduct," the act of "[c]ongregat[ing] with other persons in a public place and refus[ing] to comply with a lawful order of the police to disperse" *if* the defendant has an "intent to cause public inconvenience, annoyance or alarm, or [is] recklessly creating a risk thereof." 407 U.S. at 108. The Court affirmed the conviction of a defendant who persisted, after being ordered to leave, in attempting to intervene in a friend's traffic arrest. *Id.* at 109. The Court said the defendant:

> had no constitutional right to observe the issuance of a traffic ticket or to engage the issuing officer in conversation at that time. The State has a legitimate interest in enforcing its traffic laws and its officers were entitled to enforce them free from possible interference or interruption from bystanders.

Id. Chicago could deal properly with the problem of bystanders by adopting (if it does not already have) a disorderly conduct ordinance similar to the one approved in *Colten*.

But rather than rely on vigorous enforcement of existing laws, or enact proper new laws (if needed) to bar intimidation and interference with proper police procedures, Chicago has authorized a preemptive street sweep. Under the Ordinance, the City need not prove any act of intimidation or obstruction, or any intent to intimidate or obstruct, or indeed any wrongdoing or wrongful intent of any kind by anyone. It is, of course, *easier* to sweep the street of every person in the vicinity of a suspected gang

member than to prove any actual misconduct or wrongful intent. But acts of intimidation and obstruction can be observed and testified to, and intent to intimidate or obstruct are also provable by standard methods. As the Illinois Supreme Court said, "The city is not helpless in its war against the criminal activity of gangs." (Pet. App. 19a.) The Constitution does not permit the government to curtail the liberties of law-abiding and well intentioned citizens in order to avoid the work of identifying and prosecuting the guilty.

CONCLUSION

The Court should affirm the decision of the Supreme Court of Illinois.

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